SUPREME COURT, U. S.

MAY 23 1968

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR A REHEARING

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May 20, 1968.

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In the

SUPREME COURT OF THE UNITED STATES

Term, 1968

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR REARGUMENT OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

TO THE HONORABLE, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner GUSSIE JOFFE, defendant-appellant in this case respectfully shows:

The Petitioner Gussie Joffe, respectfully prays that she be permitted to reargue the petition for writ of certiorari heretofore filed herein under Docket #1185.

The grounds for the rehearing are substantial and "available to petitioner although not previously presented" in accordance with Rule 58 subdivision 2 of the Rules of the Supreme Court of the United States.

Substantial grounds are presented in that the statute under which the Court based its jurisdiction to entertain the custody action in which the restraint and subsequent contempt judgments were entered being Statute NJSA 9:2-2 is unconstitutional in that it draws in issue and violates Article IV and the 8th and 14th Amendment of the United States Constitution both standing alone and as utilized in the case at bar to deprive petitioner and the infant issue of the parties of equal rights and privileges, equal opportunities and protection, property and liberty without due process of law and their right to have full faith and credit

given to a New York judgment. The argument is available to petitioner in that the question was raised as set forth hereinafter, page 93 The question of its conflict with Article IV and the 8th Amendment was raised in the lower Courts - Superior Court and Appellate Divisions and the 8th and 14th Amendment violation was raised in reargument in the Supreme Court of New Jersey. Notice of appeal was heretofore filed November 5, 1967 by petitioner from the decision of the Supreme Court of New Jersey in which the petitioner specifically quoted said statute, being NJSA 9:2-2 of the State of New Jersey which states:

> "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order..."

as unconstitutional as utilized in the case at

bar in that it draws in issue, violates and is repugnant to Article 4 and the Eighth and Fourteenth Amendments of the United States Constitution, abrogates the rights guaranteed therein and conflicts therewith.

The Statutory provision believed to confer on this Court jurisdiction of this appeal is USC 28:1257.

Inasmuch as the cases hold that a writ of Certiorari may in a proper case be treated as a jurisdictional statement, in reargument petitioner respectfully requests permission to argue the constitutionality of the State statute under which the right to entertain the suits resulting in the judgment appealed, arose. Since petitioner filed a timely notice of appeal specifically citing the statute as unconstitutional and since the constitutionality was in issue in the Courts below this Court has jurisdiction to entertain the subject. Petitioner hereby covers the same legal material as would be in a jurisdictional statement on reargument of writ.

THE JUDGMENT FROM WHICH THE APPEAL IS TAKEN AND OPINION BELOW

The judgment was entered October 9, 1967 by the Supreme Court of the State of New Jersey.

The judgment from which the appeal is taken is the percuriam decision of the Supreme Court of New Jersey. A timely petition for rehearing was denied by that court on October 31, 1967. On January 16, 1968 Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including March 1, 1968. Petition for writ of certiorari was filed March 30 and denied April 30. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3). The opinion delivered by the Supreme Court dated October 9 is reported at 50 NJ 265 and 234 A 2d 232 at 233. The text of said opinion is set forth in Appendix A of the original writ hereto, p. A-1 infra. Said opinion affirmed the opinion of the Appellate Division of the Superior Court of New Jersey dated October 24,

1965, which Appellate Division decision also appeared at 50 N.J. 265 and 234A, 2d 232 and is contained in the said Appendix A hereto. The Appellate Division opinion affirmed two judgments of contempt as follows:

> "The unreported contempt order of October 20, 1964, signed by Judge Duffy of the Superior Court of New Jersey, together with the unreported contempt order of November 12, 1964 signed by Judge Nimmo of that court, are also reprinted in Appendix C hereto, p. C-1 infra."

Said contempt orders were entered without full hearing based upon the jurisdictional opinion dated August 24, 1964 of New Jersey Superior Court Judge Vito A. Concilio, in which the latter held that NJSA 9:2-2 gave him jurisdiction to entertain a custody action wherein restraints were entered, dated the 24th day of August, 1962 which is unreported; and is reprinted in Appendix B hereto, p. B-1 infra of the original writ.

In this opinion the court relitigated

jurisdiction and domicile of the parties and held that the New York final contested judgment of separation between the parties, which litigated the domicile of the parties and found domicile in New York, was not entitled to full faith and credit, and that NJSA 9:2-2 conferred jurisdiction upon the Superior Court to relitigate jurisdiction and entertain restraints restraining the appellant from enforcing her New York judgments and orders and found it had jurisdiction to entertain contempt proceedings therefor and which referred the motions pending two years to find petitioner in contempt to judges Vincent C. Duffy and David Nimmo of the Superior Court of New Jersey supra. The unreported contempt order of Hon. Vincent C. Duffy dated October 20, 1964 found the appellant in contempt of the New Jersey Courts for proceeding to judgment and enforcement of New York Judgment of Separation dated December 3, 1963, and ordered her to vacate her New York judgments or go to jail.

Said opinion and order based thereon (as punishment for contempt of visitation order) changed custody of the child.

The unreported opinion of Superior Court Judge David S. Nimmo dated November 12, 1964 found appellant in contempt in New Jersey for refusal to grant weekend visitation of the infant to appellee in accordance with a New Jersey Court order although the New York final Judgment of separation held that the child could not be removed from the State of New York.

Notice of appeal was filed November 5, 1967 from the decision of the Supreme Court of New Jersey. (AP. I)

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The writ heretofore filed stressed the failure of the Court below to observe petitioner's Constitutional right to have a judgment of another state given full faith and credit. It did not adequately cover the question posed by the Notice of Appeal filed. The Appendix inadvertantly omitted several pages of Judge Concilio's New Jersey Superior Court opinion, (which decided and denied appellant's motion to dismiss on constitutional grounds, the custody action brought under 9:2-2 from which the judgments appealed arose). Specifically ruling under the Statute, Judge Concilio directly and unequivocally stated; (Appendix H annexed)

> "The question to determine is whether this Court has jurisdiction to decide the issue of custody.
>
> "'The statutory expression of New Jersey's policy concerning the removal of minor children of divorced or separated parents from this state dates from L. 1902, c. 92, and is now found in the following provisions of the Revised Statutes, as amended:

"NJSA 9:2-2: "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the Consent of both parents, unless the Court, upon cause shown shall otherwise order..."

This Court concludes on this issue that this Court has jurisdiction to hear this matter."

"The next inquiry is whether this court can assert jurisdiction in this matter as a court in New York has before it an action commenced prior to this action wherein the parties therein are reversed and which action also has for its determination the question of custody.

It is important therefore to examine the proceedings in the New York Court from its inception to the time the petition by the defendant was filed in this Court on September 19, 1962.

The plaintiff herein..appeared specially before the New York Court for an order vacating and setting aside the summons and complaint..on the ground that the court does not have jurisdiction of the subject matter and..defendant is a person not subject to the jurisdiction of.. (that).. Court.

Justice Klein rendered a decision on

September 11, 1962 which is D-4 in evidence. It is repeated here..

"The finding by Justice Klein that he had jurisdiction in the matter..does not foreclose this court in its relation to our social institutions in accordance with the public policy of this state..It is apparent from Justice Klein's decision that plaintiff herein has appeared specially in New York. His decision tells this court that the plaintiff therein, by the voluminous affidavits filed by both parties, relative to residence, satisfied that court as to the jurisdictional requirements with respect to New York residence. This Court therefore finds that the plaintiff herein did enter a special appearance to contest the jurisdiction of the New York Court..

The defendant therein next appears before Justice Frederick Backer, for him to make a determination whether plaintiff herein had entered a general appearance in the New York matter. This court finds that there is nothing in said file, nor that plaintiff herein either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit. This Court also finds that the findings of Justice Backer is not res judicata and that this Court is not bound thereby as it is not such a finding that this Court has to give full faith and credit to under the United States Constitution.

This Court finds that the New York Supreme Court did not have jurisdiction of both parties. This motion to dismiss the complaint is accordingly denied and the restraint of the plaintiff entered herein

is vacated."

Thus not only was the unconstitutional statute stated as the basis of jurisdiction in the New Jersey complaint and was envisoned instinct and an integral part of the Superior Court opinion without which no decisions could have been reached but it was the whole, total and sole basis of and source of jurisdiction for the judgments sought to be reversed. The total impact of this statute (which directly violated both the child's and petitioner's constitutional rights hereinabove enumerated) on the life and destiny of any child born within the state boundaries of New Jersey or even delivered in a New Jersey hospital as the child at bar, is dramatically illustrated by the six year litigation (depriving the child of constitutional rights), jurisdiction to entertain which was admittedly based wholely and solely on this unconstitional statute.

The petitioner prays that this court issue an order permitting the review of the judg-

ment of the Supreme Court of New Jersey entered in this proceeding on October 9, 1967 which directly upheld the constitutionality of said statute relied upon by the Superior Court of New Jersey to give it jurisdiction to entertain restraints and contempts thereunder which were affirmed by the Supreme Court of New Jersey in a custody action of an absent child and nonedomiciled child; the right to refuse full faith and credit to decrees of other states, the right to relitigate multitudinous suits and issues already litigated, the right to flout restraints of other states with impunity while entertaining restraints of its own and deprive the infant of due process, equal rights and privileges (14th Amendment) and full faith and credit (Article 4), and imposed cruel and inhuman punishment and excessive fines on petitioner (8th Amendment) and deprivies her of her liberty without due process of law (14th Amendment)

JURISDICTION

This is a custody action involving the right of one state to control the movement of infants out of its borders their entire minority and completely control their custody, fortunes, freedom inheritance rights until they become twenty-one years, regardless of their presence, domicile in any other state and adjudicated rights there. It also clearly illustrates how the statute in question not only completely constitutes the State of New Jersey the keeper of all of the Constitutional rights of a child born in New Jersey or residing there five years, but also violates the adjudicated and constitutional rights of its parents though they be residing elsewhere and domiciled elsewhere and possess adjudicated rights and judgments in other States of the Union. It illustrates the manner in which New Jersey Courts have used the said statute to become the appellate Court and the court of last resort in the ultimate enforcement of any judgment pro-

cured anywhere else in the United States - so long as some child of the parties was born or at least lived five years anytime in its lifetime in the State of New Jersey.

Said statute claims permanent New Jersey state nativity and domicile for any child born in New Jersey or residing there only five years and such child can never rid itself of that domicile or acquire the domicile of the person having care and custody and supporting and protecting such child in another state as against such dangers and cruelties and vicissitudes it can meet at the hands of a cruel derelict parent residing in the State of New Jersey. As utilized in the case at bar - regardless of how far such child may have been taken to rid itself of a preying, destructive evil parent and regardless of how strong, protective and meaning and constructive the parental hand in another state may be for said child, said child is bound forever to the parent remaining in New Jersey and the courts there have jurisdiction

over its person regardless of its absence for many years and lack of support or care from such parent in New Jersey. That likewise the state of New Jersey or derelict parent residing therein can control or deprive said child of the adjudicated fortunes of such children though they and their fortun es be absent, and in another state.

As utilized in the case at bar said statute was used to deprive the Joffe child of its parental rights adjudicated in another state where it was being supported and resided and protected and said State of New Jersey used said statute to strip said child of its assets, adjudicated right to $200. weekly, a decent education, direly needed medical and rehabilitative care from an affluent father then in the jurisdiction of the adjudicating state.

NJSA 9:2-2 which says:

> "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are natives of this state or resided five years within its limits, they shall not be removed out of its jurisdiction."

is patently unconstitutional and repugnant to the United States Constitution as used in the case at bar enabling a New Jersey Court to directly decide cases in direct conflict with the ruling Supreme Court decisions, in that New Jersey permitted an absconding New York father to successfully utilize said statute to confer jurisdiction on its Superior Court to entertain a custody action of an absent, abandoned, intellectually gifted, half-blind New York child whose custody and right to $200. weekly support from the affluent father was awarded to themother ina litigated New York separation action wherein the father challenged jurisdiction, effected a general appearance and which New York final judgment of

separation adjudicated the domicile of the parties to be in New York and was entitled to full faith and credit in New Jersey.

In said custody action of said absent child, New Jersey presumed to sit as an Appellate Division over the Judges sitting on the same level in New York rendering the decisions in New York, and denying full faith and credit to a New York decree (Article IV), relitigated all of the jurisdictional and matrimonial issues litigated in New York two and one-half years earlier; arriving at different decisions and finding domicile in New Jersey. And said custody trial has been on trial for six years in New Jersey, being tried a few days each year, in which litigation the child has been successfully restrained from collecting any support whatsoever or medical costs and rehabilitation expense (for the child) from the husband and the mother has been found in contempt for enforcing her New York judgments (deprivation of property without due process, Amendment 14)

and ordered to vacate her valid 5 year old New York judgment or go to jail.(deprivation of liberty without due process). This, in spite of the fact that during the six year pendency of the custody action, while the child grows to manhood, the absconding father has failed to support the handicapped child although he had limitless visitation which he refused to exercise and the wife was forced to transport the child back and forth to New Jersey to avoid being in contempt on visitation. Said custody action is in its sixth year, has been utilized as a "holding operation" while the appellee has conveyed away his assets, based on a fraudulent divorce predicated upon the relitigated false domicile; (N.J.

This case some to this court on appeal of two final orders of contempt entered against the wife, one ordering her to vacate her New York decree or go to jail - the other fining her $3200. for failure to give the husband weekend visitation in accordance with a New

Jersey order, whereas the New York order gave Sunday visitation and forbade removal of the child from the State of New York. Obedience to one Court puts appellate in contempt of the other Court. Her child's domicile is in New York, she owns valuable property in New Jersey. Due to entry of the contemptorders and warrant of arrest the wife was unable to enter New Jersey to defend the custody and (replevin and injunction action appended thereto) and a divorce based on fraudulent relitigated domicile and so child and wife were deprived of their civil rights and procedural due process and property without due process of law. The restraints for violation of which the wife was found in contempt were illegally entered in the New Jersey custody action since at the time of their issuance by the New Jersey Court the wife had restraining orders against the husband both in the New York and New Jersey actions, restraining him from proceeding in New Jersey. In violation of the wife's two restraining orders in two states, one of which required two days no-

tice to vacate, the husband's attorney appeared in the New Jersey custody action on a "stayed" motion and upon a private conversation with the Court, without knowledge or notice to the wife's counsel, without so much as a telephone call to opposing counsel entered the restraints in which the contempt orders were eventually entered. This affornt to due process was attempted to be explained when the restraints were introduced in New York by respondent in one of his general appearances, and their legality litigated there. New York refused them efficacy. New Jersey 2½ years later then relitigated the New Jersey restraints, ignored the New York restraint against the husband-respondent and the New Jersey restraint against husband-respondent, found the appellant in contempt of the husband's New Jersey restraint and ordered the wife to vacate her valid New York orders and judgments or go to jail. (Depriviation of liberty without due process Amendment 14). It further changed the custody of the child (Cruel and unusual punishment, Amendment 8).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this court is sought to review two final judgments of contempt against appellant wife of respondent upheld by the intermediate and highest courts of review of the State of New Jersey.

This writer seeks review in this Court on the subject of whether local New Jersey State Statute 9:2-2 which states that a child born in New Jersey can never be removed during its minority from the State without the consent of both parents is unconstitutional and repugnant to Article IV of the United States Constitution, resulting in violations of appellants rights under the Article 4, 8th and 14th Amendments of the United States Constitution. Said statute as utilized in the case at bar was used to abridge and deprive Gussie

Joffe, appellant, wife of respondent, and the infant issue of the parties of their rights to have a New York Supreme Court final judgment of separation, which was contested given full faith and credit in the State of New Jersey, deprived her and the infant of their adjudicated right to custody, alimony and support, their liberty and freedom and changed custody of a child which was cruel and inhuman punishment.

Because of the infant issue of the parties being born in a New Jersey hospital, said statute was used by appellee, an affluent absconding New York domiciliary (against whom appellant was awarded a final judgment of separation for extreme cruelty, nonsupport and abandonment giving support and custody of the child to the wife) to commence an action for custody in the State of New Jersey of an absent child domiciled and resident in New York, obtain in New Jersey restraints against the wife from proceeding to collect support in New

Jersey, and on the wife's motiton to dismiss the New Jersey action, alleging her constitutional right of respect for her New York judgments, the New Jersey Court held that said statute gave it authority to investigate the jurisdiction of the New York Court. Thereafter though the New Jersey Court on investigation admitted the husband litigated jurisdiction in New York on a special appearance it proceeded to relitigate the issue of domicile and all of the marital issues litigated in New York, arrive at a different decision, deny full faith and credit to the New York decree and order the wife to vacate her New York judgment or go to jail, and as punishment changed custody of the child.

Said statute by conferring jurisdiction of an abbent child on New Jersey to entertain a custody suit and utilization of restraints entered in the New Jersey Custody suit enabled the absconding father to maintain said custody suit on trial so that defendantcould not have

access to the Appellate Courts, for six years in New Jersey and successfully withheld support awarded by the New York Court for medical and rehabilitation expense of this child, kept the child's schooling and home, always temporary, his future in a state of suspension, subjected him to traumatic experiences of prolonged trial, and physchiatric tests. Said statute during the entire formative years of the child's growth totally deprived the said child and the appellant of adjudicated property rights, support and the duties cast upon the appellee by the Courts of the State of New York, in a contested matrimonial proceeding between the parties.

And said statute was used to confer jurisdiction on the New Jersey Court to enter illegal restraints restraining the wife from proceeding in New York to collect on her judgments.

child and refusing to permit his loved step-brothers and sisters who had been raised with him to be with him or talk to him.

Thereafter New Jersey Supreme Court Judge Concilio two years after the motion to dismiss the New Jersey action was made and two years after the New Y rk final judgments were entered awarding custody and support to the child among other things, and after issuing restraining orders restraining the payment in New York of any support to the child, and while the husband refused to exercise visitation, took testimony on the jurisdiction of the New Jersey Courts to entertain the custody action of this child under NJSA 9:2-? in violation of the Full Faith and Credit Clause of the Constitution and determined it had jurisdiction of the absent child by virtue of the above statute and so jurisdiction to enter restraints. The Court referred the motion to New Jersey Superior Court Judges Duffy and Nimmo who found the wife in contempt for entering support orders

and collection of support in New York and found the wife in contempt of court for violating restraining orders restraining her from proceeding to take money from the New York receiver and collecting money judgments in the State of New York and using sequestered funds for the support of the child. It fined her $3500. (excessive fines under 8th Amendment) for failure of the husband to pick up the child approximately 50 times in the two years which he had refused to see the child and awarded custody of the absent child to its non-supporting non-visiting father (cruel and inhuman punishment), who had neither seen or supported the child in almost 2½ years and refused the child access to step-brothers and sisters then residing with a former wife, but who had been raised and educated by the infant's mother.

The contempt orders ordered the wife to vacate all of the New York orders and judgments or go to jail. (Refusal of full faith and credit under the 4th Amendment) and changed cus-

tody to the father (cruel punishment). The husband respondent was $40,000. in arrears of support payments in New York and $4,200. in arrears of $35. weekly support payments awarded in the interim order in New Jersey. Counsel fees were denied the wife on behalf of the child and the New Jersey custody action after 2½ years was moved to trial. The Appellant remained outside the jurisdiction of New Jersey and could not enter to testify (deprived of civil rights).

Warrants of arrest were issued out of the Superior Court of New Jersey to apprehend the wife petitioner and incarcerate her until she vacated her New York judgments, orders and decrees. Thus based on denial of full faith and credit this was deprivation of liberty without due process (14th and 8th Amendments). Meanwhile, two and a half years earlier the Respondent had signed an assignment assigning away the assets sequestered in the State of New York and the wife became the sole support of the child then under intensive medical care to save his eyesight.

QUESTIONS PRESENTED:

1. Under New Jersey local Statute NJSA 9:2-2 which provides:

> "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are native of this State, or resided five years within its limits, they shall not be removed out of its jurisdiction without the consent of both parents."

is a three year old child born by happenstance in a New Jersey hospital deprived of its right to claim a state's parens patriae jurisdiction in any state where it may be found or is said statute discriminary against children born in New Jersey and so violative of the Fourteenth Amendment of the United States Constitution.

2. Is NJSA 9:2-2 unconstitutional in that it discriminates against children born in a New Jersey hospital or residing in New Jersey five years though domiciled elsewhere, in that such child cannot during minority

acquire the domicile of the parent which supports and nurtures it, after abandonment by the other parent, and is deprived of its right to become a domiciliary of another state during its minority contrary to the Fifth and Fourteenth Amendment and the Fourth Article of the United States Constitution.

3. And is NJSA 9:2-2 not unconstitutional as being repugnant to the full faith and credit clause of the Constitution and the equal rights clause of the Fourteenth Amendment in that any child residing five years in New Jersey or born in a New Jersey hospital could have no other domicile in the world throughout its minority even though a competent court of another state wherein the child is then residing and supported adjudicates the child's domicile, right to support and custody elsewhere in a valid proceeding entitled to respect and recognition under the Constitution. And where the said statute is used to confer jurisdiction

on a court to relitigate those issues litigated elsewhere prior thereto, does not such denial of full faith and credit result in denial of equal privileges under the Constitution since such children, are not entitled to parens patriae protection of any state in which they may be found physically or in which their parents reside, as can other children citizens of the several states - particularly as used in the case at bar where the state in which the child physically resided awarded said child to its mother and $200. per week support from its father whereas New Jersey refused to enforce said custody or support provision, subjected the child to a six year custody relitigation, making an absent child a ward of the New Jersey Court, making its future uncertain, schooling always temporary and giving it only $35. weekly support from an affluent father without taking testimony, subjecting the child to psychiatric tests and other trauma, depriving the said child of due process of law, equal

privileges and procedural due process, under the Fourteenth Amendment, and its right to have its judgment given recognition under Amendment IV, which custody action continues to date after six years on trial.

4. Where a New York Court in a separation action on challenge to its jurisdiction by the appellee husband, held it had jurisdiction and proceeded to judgment upon the jurisdictional and matrimonial issues; was not its determination entitled to full faith and credit and enforcement in New Jersey? Requiring the New Jersey Superior Court to dismiss an action seeking to relitigate those issues and the domiciliary issues decided in New York all of which respondent sought to relitigate in a New Jersey custody action of an absent child based upon the above statute. And was not the above statute unconstitutional in the manner of its utilization and on its face in that it was used to confer jurisdiction on a New Jersey Court to relitigate domicile of the

parents in a custody action of an absent child and relitigate all of the marital and custody issues litigated in a separation action between the parents in another state. Then having established domicile in the relitigation of domicile in the custody action the court then proceeded to permit the respondent to bring a multiplicity of suits based on the relitigated domicile resulting in the following additional constitutional deprivations repeated violations of Appellee's constitutional rights and those of the infant raising the following subordinate questions.

(a) Whether local New Jersey Statute NJSA 9:2-2 as used in the case at bar to confer jurisdiction on the New Jersey Superior Court to entertain custody and replevin action (subsequently amended to add a cause of action for an injunction restraining the wife from litigating any of her matrimonial rights in any state other than New Jersey) which actions deprived appellant of her

right to have respect given to her New York final judgment of separation is unconstitutional and repugnant to Article IV of the United States Constitution. And as a result of that violation does it not become repugnant to the Eighth and Fourteenth Amendments of the Federal Constitution in that not only does it abridge appellant's right to respect for her New York judgments, but in so doing results in denial to her of equal rights and immunities, the right to procedural due process and takes property without due process of law - all solely because she had a child bron in New Jersey.

Whether under the above statute the Superior Court of New Jersey in a custody action of an absent child commenced by a father, wherein the mother was served personally in New Jersey can issue an order to arrest the mother of a three year old child born by happenstance in a New Jersey hospital which

order based upon a relitigation of domicile, requires her to remain incarcerated until she vacates a bona fide two year old contested judgment of separation of another State wherein all parties resided throughout the marriage (which judgment adjudicates jurisdiction, custody, domicile, marital res, support, right to restraints, rights to furniture and personalty and all of the marital rights of the parties) thus depriving the mother of her right to have her judgment given full faith and credit under Article IV of the Constitution and abridging her right to equal privileges and immunities under Amendment Fourteen, - All by reason of the fact she had a child born in New Jersey. And since the order of arrest was entered during trial and she is subjected to arrest upon entering the State of New Jersey, she cannot defend the relitigation of the custody action which has a second count for replevin of furniture, is she not deprived

of property without due process of law?

b) Is a child of three years, born in a New Jersey hospital of parents residing in New York, of a mother resident through the marriage and working continuously in the State of New York, whose father has abandoned it and refused to support said child, deprived of its right to acquire the domicile of its mother who supports and nurtures it, by virtue of the fact that the father is able to abscond to the State of New Jersey where the parents maintained an auxiliary residence, thus, permitting the father to avoid the duties cast upon him by a bona fide contested New York separation judgment by claiming the child was removed from the State of New Jersey under local Statute NJSA 9:2-2. And is said statute thus not repugnant to Article IV and Amendment Fourteen of the United States Constitution in that it abridges the child's right to have its judgment given full faith and credit, equal rights and immunities, and right to have due process of

law and finality of litigation.

c) May a wife who has commenced a separation action in New York State (where the parties resided throughout the marriage, attaching furniture and other assets of the husband because he has absconded, and after attaching the infant issue of the parties physically present in New York by an interim custody order and who served the husband in New Jersey - after the husband enters an appearance in New York challenging jurisdiction and effecting simultaneously a general appearance in New York - thereafter be served with a complaint for custody of the same child, (absent in New Jersey) under NJSA 9:2-2 and replevin of the same furniture, and after New York litigated jurisdiction, finding jurisdiction in New York, be forced to relitigate jurisdiction and the matrimonial issues 2½ years later in New Jersey and be ordered to vacate her New York final judgment of separation awarding her custody, maintenance, support and ownership of furniture or go to

jail for contempt of New Jersey Courts?

Or is this failure to grant full faith and credit and thus repugnant to the Constitution under the Supreme Court of the United States holding of Durfee v. Duke, 375 US 1 Ed. 2d and the cases cited therein of Treines v. Sunshine Mining Co. 308 US 66 84 L Ed 85, 60 S Ct. 44, Davis v. Davis, 305 US 32, 83 L Ed 26, 59 S Ct. 3, 118 ALR 1518; forbidding the relitigation of jurisdiction and granting finality of litigation and forbidding multiplicity of suits - particularly where the first court had already litigated jurisdiction on the defendant spouse's challenge.

d) Whether NJSA 9:2-2 is repugnant to the United States Constitution in that a parent domiciled in New York, because it has a child born in a New Jersey hospital is deprived of its right to adjudicate its marital rights in the state of said parent's domicile, as can parents of the several states, including custody of said child, but not limited

thereto, or is it bound (because New Jersey refused respect) to have an adjudication of jurisdiction and marital rights first in a New Jersey custody action in the State of New Jersey before it can proceed in a marital action in any other state (depriving said parents of due process, full faith and credit and privileges and immunities of citizens of the several states.

e) Where a wife commences an action for separation in New York one of two states in which the parties have resided in two homes since the marriage and the husband appears by his attorney in New York and challenges jurisdiction and in his affidavits argues the merits of the cause effecting a general appearance and where the wife is thereafter served personally in New Jersey with a complaint under NJSA 9:2-2 for custody of an absent child and replevin of furniture, which child and furniture were and are present in New York, and she promptly obtains restraining orders in both states restraining the husband from proceeding in New

Jersey, can the husband thereafter in violation of the wife's restraints obtain an illegal restraint ex parte against the wife restraining her from proceeding in New York (without the two days' notice required by the wife's restraint against the husband) without knowledge or notice, without a telephone call to opposing counsel, but on a private conversation with the Court. And can said last restraint restrain the wife from proceeding with the New York separation action first begun, after New York finds jurisdiction in New York of the marital res, when the child, the wife and the furniture were at all times physically present in New York from whence the appellee husband had absconded, or is this lack of due process under the Fourteenth Amendment and the failure to give full faith and credit.

f) In an action commenced under N.J.S.A. 9:2-2 whether the taxing of fines of $50. each day of each weekend the appellee did not have visitation with his child in New Jersey

under a New Jersey Court order (entered subsequent to a New York order where the child was physically present at all times) which ordered single day visitation prohibiting the removal of the child from New York - (which appellee refused to exercise) and the changing of custody of the child as a punishment of the mother for contempt is not exeessive fines and cruel andinhuman panishment under the Eighth Amendment.

g) Whether the refusal of the Supreme Court of New Jersey to remand the contempts for full hearing (the wife rested on the jurisdictional question during contempt hearing) is deprivation of property without due process of law,lack of procedural due process under the Fifth and Fourteenth Amendments under the holdings of the supervening decision of the United States Supreme Court in the case of Townsend v. Sain (372 US 293).

k) Whether under NJSA 9:2-2 the fact that appellant is the mother of a three year old

child born by happenstance in New Jersey hospital, deprived her of the finality of litigation guaranteed by the United States Constitution, Amendment IV as ennunciated by the Supreme Court of the United States in Durfee v. Duke, supra and the cases cited therein or deprives her of her right to due process. And must she litigate her marital rights in a custody action based upon a custody complaint contrary to the United States Supreme Court holding in Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925) and Halvey v. Halvey which cases held that the presence of a child within the state did not confer on the parents the right to litigate their differences in a custody action. "Parents so situated" must litigate their rights at home.

1) Whether plaintiff having served defendant, a resident of New York, personally in New Jersey with a complaintfor custody of a child, under NJSA 9:2-2 can amend said custody action to add a cause of action for a permanent

injunction enjoining defendant from proceeding to enforce a New York bona fide contested judgment of separation providing alimony and support by serving an amended complaint by mail or is this deprivation of due process under the Fourteenth Amendment, thus adjudicating parental rights in a custody action, contrary to the Supreme Court holding in Finlay v. Finlay supra.

And can said statute be utilized as a means of effecting a "holding operation" deliberately keeping a trial pending for six years during which appe llate courts refused to entertain the interim jurisdiction order while the husband obtains a unilateral divorce in New Jersey based on New Jersey's relitigation of jurisdiction and finding domicile in New Jersey contrary to the finding of domicile in New York by the New York Courts. And can the contempt order which takes four years on appeal to the Supreme Court of the United States while the wife is excluded by the order

of arrest from entry into the State of New Jersey to defend said actions be a means of the husband obtaining uncontested judgments in the State of New Jersey enabling him to partition property and dispose of his assets so that by the time the wife obtains recognition for her New York decree, she is armed with a hollow victory, having lost her marital status, her property during the six years of the pending litigation and the appeals, while the child grows to manhood without support of an affluent father, depriving the child and wife of their adjudicated support, a speedy trial, procedural due process and property without due process of law.

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

NJSA 9:2-2 states: "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are native of this State, or resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if or suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise oreer.."

United States Constitution, Article IV Section 1, "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution, Amendment VIII "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

United States Constitution, Amendment XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abrdige the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act,
"Section 1165a Conditions attached to maintenance of action for annulment or separation. An action to...or for separation may be maintained in either of the following cases:

1. Where both parties are residents when the action is commenced.

2. Where the parties were married within the state and either the plaintiff or the defendant is a resident thereof when the action is commenced and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action. (Added L. 1942, ch. 288, September 1)."

Sec. 1166. Residence of married woman in action for..separation. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere."

6. Restatement of the Law of Conflicts Section 117:

"A state can exercise through its courts jurisdiction to determine the custody of children only if the domicile of the person placed under custody or guardianship is within the state."
(Volume page

(The above is in addition to those set forth in the original writ.)

STATEMENT OF THE CASE

Petitioner refers the Court to the Chronology of legal events, pages 7 - 19 of the original writ hereinafter set forth in short narrative outline for the sake of brevity.

In 1962 the three year old Joffe child, was residing in the State of New York where he was attending nursery school and had resided throughout the three years of his life, though he was born in a New Jersey hospital because his father was a surgeon there. Said child, a gifted, legally blind boy, had been abandoned, financially, physically and emotionally by his father and was being supported wholely and totally by his mother, who is practicing law in New York and had throughout the marriage. His much-married father, appellee-respondent had abandoned the home seeking to marry yet again.

In June of 1962 the Supreme Court of the State of New York sequestered respondent's assets in New York and ordered a Receiver in Sequestration to hold the same subject to the

order of the Court for the purpose of support, nurses and medical attentions among other things for the said child, which the said receiver did.

On July 12th the Supreme Court of the State of New York issued an order in Petitioner's separation action commenced there granting interim custody of the child to his mother and ordering the plaintiff-appellee father to show cause why custody pendente lite should not be awarded to the mother in a separation action; as part of the cruelty alleged in the separation action the mother recited failure of the respondent to provide urgent medial attention for the boy, heat and food and other acts of physical cruelty to the child. As part of the abandonment she alleged he kept the New York apartment and a New Jersey alternate house and the latter he abandoned, saying it was too far from his office, though it was but a 15 minute drive, and the former of which he had already removed the furniture from.

On August 11, 1962 the Supreme Court of the State of New York ordered the respondent husband to show cause why money should not be withdrawn from sequestered funds for thepayment of support for the child, his nursemaid, medical attention and the taxes and mortgage on his home.

On July 11th the respondent (who refused to see the child, talk with the child or permit the child's step-brothers or step-sisters with whom he had been brought up to see or speak with the child and refused even to talk with the child on the telephone), appeared by New York counsel and moved to vacate the service of the summons and complaint in the separation action (which was to decide the custody of the child) on the ground that the Court had no jurisdiction of the subject matter, the marital res, the child or of him personally.

In the affidavits on the said motion the plaintiff-appellee argued the merits of the separation complaint and effected a general appearance in the New York action. In the said affidavits he also argued against the merits of the motion to withdraw monies from sequestered funds for support of the child and against a pendente lite support motion.

On September 11, 1962*, the New York Supreme Court adjudicated that New York Courts had jurisdiction of the marital res of the child and the parties stating (See Appendix D, p. D-1) (Order of Klein, J. Dated September 11, 1962).

* Note the Chronology of events in error listed. Judge Klein's jurisdictional decision on September 17, it was issued September 11th. This is important because this is the decision in the record which shows that New York had jurisdiction of the marital res prior to the commencement of the New Jersey custody action wherein Gussie Joffe was served August 23, 1962. See p. 10 of the original writ.

And on September 25th the New York Court ordered the Receiver in sequestration to make payments of support to the infant issue of the parties as well as payments of mortgage and taxes on his home and other expenses.

Throughout the year the child received medical care from the receiver in sequestration and support. No funds were forthcoming from the father, personally.

In October of 1962 the plaintiff-appellee father moved to vacate the order of sequestration and prohibit the child from receiving support from the receiver out of the assets sequestered belonging to his father. The motion to vacate was denied and the Supreme Court of the State of New York issued an injunction staying the father, plaintiff-respondent from proceeding in an action for custody of the child brought in New Jersey where he served the wife petitioner with a complaint for custody of the child under the New Jersey Statute in question. The Complaint requesting custody

of the child specifically alleged jurisdiction under Statute NJSA 9:2s2.

In September of 1962 the wife moved to dismiss the New Jersey action on the ground the infant was physically present in the State of New York, jurisdiction and marital res had been adjudicated in New York on the husband's challenge and the State of New Jersey had no jurisdiction to entertain the custody action under the said statute of an absent abandoned child who was a New York domiciliary and being supported in New York by its mother, citing constitutional grounds. The mother also obtained a restraint in New Jersey (Sept. 20, 1962 restraining the husband from proceeding with the New Jersey action. Said restraint stated on its face it could not be vacated except on two days notice. On Sept. 21, 1962 in derrogation of the two existing restraints, one in New York and one in New Jersey, the husband respondent obtained a restraint against the wife without notice or hearing (let alone 2 days notice), from proceeding in the State of New

York to obtain support for the child from his moneys. The receiver in sequestration in New York however, continued to enter orders and pay out monies for the support of the child.

In direct abrogation of the New York care and protection of said child the State of New Jersey on Sept. 21, 1962 entered the foregoing restraint - an order prohibiting the wife from proceeding with the New York action and the custody, and collecting money without ruling on the wife's motion to dismiss the New Jersey action on Constitutional grounds and with no hearing on its jurisdiction to enter such restraint and on Dec. 19, 1962 with no hearing or testimony on standard of living, the New Jersey court issued its own order of support for the child of $35. per week, awarding weekend visitation to the husband (he to pick up the child), stripping the child of the care, funds and protection of the State of New York wherein he was living.

The father respondent thereafter moved in New York for an order restraining the wife

from proceeding to collect or enter orders for monies to be collected from sequestered property for the child and offered in evidence the New Jersey restraining order asking the New York Court to restrain the mother from collecting the $200. per week under the pendente lite support order of New York. The New York Court however refused enforcement of the New Jersey restraint and specifically stated it did not reach the receiver - an officer of the court. The New York receiver in sequestration continued to pay money for the support of the child, paying the nursemaid and mortgage, taxes and repairs on the house. From time to time thereafter New Jersey entered restraining orders to restrain these payments against the wife and plaintiff- respondent husband sent said orders to the New York Court which refused them efficacy. Meanwhile the New Jersey restraint of September 20, 1962 of the wife restraining the husband from proceeding in the State of New Jersey was still in effect, and continued.

New Jersey counsel for the wife moved to vacate the September 21st restraint of the husband against the wife, but said motion was carried undecided together with all restraining orders for two years. Thereafter the New Jersey Court was asked by the father to make the infant (absent) a ward of the New Jersey Court based upon the claimed unconstitutional statute.

On December 3, 1963 after the receiver in sequestration moved the New York case to trial the Supreme Court of the State of New York entered a final separation judgment giving the infant $200. per week, awarding his custody to his mother, with Sunday visitation to the father and prohibiting the removal of the child from the State of New York. Thereafter the State of New Jersey moved to make the child, then always absent, a ward of the New Jersey Court. Said motion was on the motion of a father wholely and totally not supporting the child, refusing to see or talk with the child, refusing to exercise Sunday visitation with the child.

THE NEW YORK ACTION

Defendant wife on December 3, 1963 was granted a final judgment against plaintiff husband by the Supreme Court of the State of New York on the ground of cruel and inhuman treatment, abandonment and non-support.

Said judgment in part, stated as follows: (AP. G)

> "The plaintiff having been duly personally served with summons and verified complaint outside the State and the defendant having appeared generally in this action by his attorney, Benjamin Lichtenstein, of 332 East 149th Street, Bronx, New York, giving this Court in personam jurisdiction of his person..." (underscoring mine).
>
> "ORDERED, ADJUDGED AND DECREED that the plaintiff GUSSIE JOFFE be and she hereby is separated forever from the bed and board of the defendant, SIDNEY H. JOFFE, as prayed for in the complaint herein, because of the cruel and inhuman treatment, abandonment and non-support of plaintiff by defendant, and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the defendant shall have the right to have visitation of PHILIP LEWIS JOFFE, the issue of the marriage every Sunday of each week commencing on the 22nd day of November, 1963 between the hours of 9:00 A.M. and 5:00 P.M.; but at no time is he to remove the said child from the jurisdiction of the said Court; and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the

plaintiff have the care and custody of PHILIP LEWIS JOFFE, an infant, the issue of the marriage, and it is further

"ORDERED, ADJUDGED AND DECREED and found by this Court that both plaintiff and defendant were domiciliaries of the State of New York continuously throughout the entire marriage to the date of the entry of judgment herein, that the matrimonial res has been at all times since the marriage in the State of New York and continues so to be and the infant has since birth been domiciled in the State of New York, and it is further

"ORDERED, ADJUDGED AND DECREED that plaintiff is to receive from the defendant the sumof $500. per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300. of said sum being allocated to the plaintiff and $200. to the infant issue), and it is further

"ORDERED, ADJUDGED AND DECREED that plaintiff is the sole owner of all furniture furnishings and personalty listed as paid for by her or given asgffts to her as indicated in the various schedules of"Exhbit 9" in evidence on the hearing of November 4, 1963, and it is further"

"ORDERED, ADJUDGED AND DECREED that judgment is hereby entered against the defendant in favor of plaintiff for the sum of $5,696.00 representing arrears of alimony and support pendente lite and the sum of $2500. attorneys fees awarded previously by the Court, and it is further...."

Simultaneously with the entry of said final judgment of separation, the said Supreme Court

Judge Thomas A. Aurelio made, signed and entered findings of Fact and Conclusions of Law wherein he adjudged that the defendant-husband therein had appeared generally, contested the New York action on the merits by his attorney, Benjamin Lichtenstein of New York City and that the New York Courts had in personam jurisdiction of his person, from the date of service of the summons upon him, ie. July 12, 1962 under Sec. 232 of the Civil Practice Act of New York.

It should be noted, and it is irrefutable, the very domicile (apartment of the child, the only issue of this marriage, and the furniture and furnishings were at all times prior and subsequent to the commencement of the New York action, physically present in the State of New York, where the husband had established them, abandoned them in New York, and still so remain, the furniture was held by sequestration.

The New York Complaint alleged that the parties had at all times resided in both the

the State of New York and the State of New Jersey. The parties had two marriage ceremonies, one a civil one in New Jersey and a large religious and civil ceremony in New York, and had occupied a New York apartment throughout their marriage. In the years 1959 to 1962 they simultaneously occupied a New Jersey mansion which latter masnion had been purchased for the purpose of conversion into a Convalescent or Senior Citizen's Home (the husband is a physician). During the conversion and while awaiting a zoning variance the parties had occupied the said mansion temporarily with the three children of the husband's first marriage which children were residing temporarily with the parties until their mother (who had their legal custody) found them a new home with her (she had sold her previous home). The parties had also occupied a New Jersey home previously owned by the husband and his first wife, while awaiting a sale thereof.

Although Appellee had always lived in New

Jersey, at the time of meeting and marrying Appellant, appelleee had advised her that due to the undesirable newspaper notoriety accompanying the breakup of his first marriage he wished to disassociate himself from his New Jersey community where none of his neighbors spoke to him and reside in New York.

Throughout the entire marriage, and every single day thereof the parties and the sole infant issue of the marriage had maintained and lived continuously in a New York apartment, first at 139 East 35th Street and then 44 East 67th Street, and the defendant wife had resided in said same apartment for 14 years prior thereto, and still continues to so reside with the infant.

Prior to abandoning the wife, the husband persuaded her to take a larger and more luxurious New York apartment (the 67th Street apartment) stating that he had put up the New Jersey mansion for sale (and actually listing it with realtors) and he moved the more valuable pieces

of furniture from New Jersey into New York, spoke with realtors in New York who obtained a New York apartment for him, moved from the smaller New York apartment to the larger one, thereafter talked with the Superintendent of said apartment house about suggested decoration and changes in said apartment and continued to live with the wife for nine months in the New York apartment - taking the children of the previous marriage, whom plaintiff had raised from childhood, and placing them with their married sister in New Jersey. He arranged charge accounts under his signature in New York for the 67th Street, New York apartment, placed the infant issue of the parties in a New York school and advised the wife that henceforth there was to be no New Jersey home excepting for an apartment in New Jersey surreptitiously taken by the husband ostensibly for the oldest son of the first marriage who worked near said apartment, a small two room flat near a veterans project. The husband advised

the wife that he would "sleep-over" in New Jersey in his son's said apartment on nights when he had emergencies at thehospital in New Jersey where he was an attending physician.

In tru th and in fact this was pursuant to a scheme to obtain the wife's signature on a deed to sell the Montclair New Jersey mansion (which was originally taken as a business venture by the parties) and invest the proceeds in the stock market where the husband by his plunging and acting on irresponsible tips had become financially involved in disastrous stocks and was desperate to save his margined assets. In addition the much-married respondent was seek ing to marry yet again. In June of1962, because the wife refused to sell the $100,000. property to invest the proceeds in the market and after cancelling all of the wife's charge accounts, her insurance and notifying her he was leaving her, the husband moved back to New Jersey into his son's apartment, refused a key to said apartment to the wife, refused her entrance thereto and threatened to call police when she came

over with the child who asked for his father.

The husband had throughout the marriage, supported and maintained the New York apartments, kept his most expensive clothing and art treasures, there, maintained all of his business investments through New York brokers and trustees, did all of his socializing with the exception of large parties there, maintained all of his charge accounts in New York, giving the New Jersey address to avoid taxes and large insurance payments for their several automobiles. The husband from the outset of marriage had insisted that the wife continue to practice her profession - law - in New York and maintain a domicile in New York so that she could aspire to a political career, her law practice and the New York domicile. It is significant to note that such political career absolutely requires New York residence.

The wife paid Federal Taxes in New York, the State residence tax and was permanently registered democratic in New York as a voter through-

out the marriage. The husband, a republican maintained his New Jersey voting so as not to embarrass his wife publicly and politically, and because his hospital affiliations and work was in New Jersey and same were intertwined with his politics.

FILED PAPERS IN THE
NEW YORK ACTION

Defendant Gussie Joffe, instituted suit in the State of New York on Jun3 21, 1962 seeking a separation from plaintiff, her husband, based on cruel and inhuman treatment, abandonment and non-support. In the same action she also sought custody of the infant child of the marriage.

Pursuant to New York practice, a writ sequestering plaintiff's asset in New York State was issued by the New York Court with the complaint. This writ, a summons and the complaint were personally served on plaintiff in New Jersey.

Justice Flynn of the New York Supreme Court signed an order on July 12, 1962 compelling

plaintiff to show cause why custody should not be given to the defendant and why the defendant should not have alimony and counsel fees pendente lite. This order temporarily granted custody to defendant [redacted]. On July 22, 1962 the return day of the order, plaintiff appeared by his counsel in New York seeking an adjournment of the matter and obtained it.

The New York Supreme Court, by Miss Justice Amsterdam, about two weeks later, issued an order directing plaintiff to show caus why moneys should not be withdrawn from his sequestered assets to pay for support of the child, a nursemaid, and the mortgage and taxes on the property owned by the parties in Montclair, New Jersey (appendix D, p. D-1)*

The plaintiff husband appeared in the New York action by his New York counsel and on August 14, 1962 moved to vacate the service of the summons and complaint for lack of jurisdiction of the person and subject matter, the infant and the furniture, on the ground

* All references to Appendix means Appendix to original writ.

that the parties were domiciliaries of the State of New Jersey (where the husband had always maintained a medical practice with his brother who resided in New Jersey),'

He put in an affidavit which read in part:

> "I cannot at this time meet some of the issues created by the plaintiff without avoding a general appearance and I ask the court to take this factor into consideration. However, I have been advised that the plaintiff (defendant herein) has made the necessary current payments to the bank so that there is no immediate danger of foreclosure".

This affidavit arguing merits filed in opposition to themotion for alimony add support and to withdraw monies from sequestered funds; effected a general appearance by the husband defendant appellee in New York.

Voluminous and exhaustive affidavits were submitted by both parties on the subject of jurisdiction, residence and domicile. Both parties submitted licenses, autbmobile ownerships, charge accounts, tax forms, bank accounts, religious affiliations, voting registration, social activities, doctors locations, etc. The wife submitted, as exhibits, sworn

affidavitsof the husband wherein in other law suits in New York he had designated himself as "residing at 139 East 35th Street, New York, City..." the New York apartment of the parties and "maintaining a house in New Jersey".

The New York Supreme Court (Klein, J. Sept. 12, 1962), Appendix D[illegible] denied the plaintiff husband's motion to dismiss the New York separation action for lack of jurisdiction, domicile and residence and held that sufficient had been shown to clearly prove that the parties resided in New York (residence in matrimonial actions in New York is synonymous with domicile) and that New York had jurisdiction of the action.

In his motion to reargue (by letter addressed to Justice Klein dated Sept. 10, 1962 he said his motion for reargument was made for the following reasons:

"(1) Your Honor's opinion does not indicate whether defendant is a New York or New Jersey resident;

" I do not believe that an award can be made for the support of issue of the marriage separate and distinct from the award of temporary alimony to the wife. In addition the defendant has been sending the sum of $35. per week for the support of the infant even though the plaintiff has not permitted visitation by the defendant. "

(3) There is nothing in the order of sequestration signed on June 21, 1962 by the Hon. Francis X. Conlon authorizing the Receiver to may any payments in connection with the operation of real estate in the State of New Jersey. Furthermore, I do not believe that the real estate in the State of New Jersey is subject to the jurisdiction of this court.

(

These arguments specifically effected further general appearance, see Matthew v. Matthew, 14 App.Div. a case on all fours in New York, 217 N.Y.S 2d 736.

On September 25, 1962 an order was entered by Justice Klein embodying his September 12 denial of plaintiff's motion to quash service. On the said day the same justice denied reargument requested by plaintiff and adhered to its original decision of September 19 (P. 12 original writ) It denied the motion to dismiss for lack of

jurisdiction, granted support and ordered the husband's New York receiver who had attached the husband's New York assets as well as the furniture in New York to pay out monies for the support of the wife and the infant child.

Subsequent to the New York Court's denial of plaintiff husband's motion to dismiss for lack of jurisdiction and after losing all three motions the husband filed notice of appeal to the Appellate Division of the Supreme Court of New York, but never perfected the said appeal. Thereafter the husband, by his New York Counsel:

1. Argued motions for custody of the child, alimony, counsel fees, child support and a motion to withdraw money from sequestered funds before New York Supreme Court Judge Klein;

2. Moved to intervene in, and argued a motion to punish the husband's trustee for contempt for failure to turn profits of a trust over to the Receiver in sequestration(before New York Supreme Court Judge Chimera) for the support of the wife and child in accordance with previous court orders;

3. Moved to vacate the order of sequestration; which had attached the important antique furniture of the parties, before Judge Chimera of the New York Supreme Court;

4. plaintiff successfully defended a motion to restrain him before Judge Aurelio and requested a restraint, and litigated the validity of 2 New Jersey restraints.

5. moved to stay the New York Supreme Court before Judge Aurelio;

6. and otherwise appeared generally and argued the merits of the case after losing the jurisdiction motion. (See Appendix F, pF-1)

Thereafter, in the said New York suit, the wife moved for a declaration by the Court that by his activities in appearing and arguing the various motions and presenting arguments on the merits in the New York separation action the plaintiff had made a general appearance in the New York Suit. In answer to the said motion plaintiff interposed copies of

the New Jersey Superior Court preliminary restraining orders. The said motion for a finding of general appearance in New York was granted. A copy of the order thereon (Backer, J. Jan. 11, 1963) is before this Court, in Appendix F of original writ, p. F-1)

New York Supreme Court Judge Backer said:

"ORDERED AND DECLARED that the defendant by his participation in the case as set forth more fully herein has appeared generally herein."

"ORDERED AND DECLARED that the defendant has submitted himself generally to the jurisdiction of this Court conferring in personam jurisdiction over his person in the within case."

NEW JERSEY ACTION

Subsequent to the commencement of the New York action the plaintiff husband, after entering a general appearance in New York (and after losing the jurisdiction motions), ran across the river to New Jersey and brought an action in New Jersey (on the same issue of custody and furniture between the same parties which were in issue in the New York action and on which

the New York judgment was res adjudicata):

1) For custody of the infant son of the parties (said child was at all times physically present andresiding and attending school and camp in the State of New York).

2) Replevin of the furniture which had already been attached by the order of sequestration in New York (and the validity of which attachment had already been litigated when the husband by his New York attorney moved to vacate the order of sequestration and lost).

At the time of the commencement of the New Jersey suit an order granting the wife custody of the child had already been granted in New York where the child was living and had lived since birth (although he was born in a New Jersey hospital) and the furniture had already been attached in New York and the plaintiff husband had already appeared as plaintiff by his New York Counsel, Benj. M. Lichtenstein, Esq. of 244th Street, New York,

New York (his first cousin) in the New York proceedings and had argued the merits of the case.

The plaintiff wife moved to dismiss the New Jersey action on the ground the child being physically present in New York, said State was the only State standing in Parens Patriae to said child, New Jersey had no jurisdiction, and on the ground that New Jersey is required to give full faith and credit to the findings of the New York Court on the litigated question of jurisdiction rasied on the husband's own motion by his New York counsel in the New York action and having been participated in by both parties and decided in New York and which was res adjudicata.

Two years after the New York final decree and 2½ years after institution of the motion New Jersey (Concilio, J.) finally ruling on said motion found that NJSA 9:2-2 gave New Jersey jurisdiction to entertain the custody suit and denied full faith and credit to petitioner and did the following: (Appendix B, p. B-1)

1. Refused to dismiss the New Jersey action but

2. Took testimony on the question of

jurisdiction.

3. Asked to review the papers that had been filed in the New York Courts;

4. Presumed to review the decision of the various(eight) judges who decided the various litigated motions in New York Courts;

5. Ignored the fact that the husband had litigated New York's right to attach the furniture (which order of sequestration plaintiff had moved to vacate in New York and lost) and;

6. Ignored the fact that the husband had litigated the New Jersey restraints and New York denied them efficacy.

7. Stated that based upon his review of the New York filed papers, filed in New York County Clerk's Office, the various Judges who decided the various motions on the said filed papers in the New York Courts had been erroneous in their findings, that the parties were not domiciliaries of the State of New

York but of the State of New Jersey, and that the husband had not appeared generally in the New York action.

He further found and stated in his opinion that:

8. based upon the papers before Judge Backer it was his opinion Judge Backer made an erroneous finding of general appearance, that there was no general appearance.

9. That Judge Klein who vacated the special appearance of the plaintiff, (Order of Klein, J. December 12, 1962, Page 2) did not thereby leave a general appearance as New York Judge Backer stated and determined (order of Backer, J. Jan. 11, 1963),

10. and that Judge Aurelio in his findings of fact and conclusions of law found incorrectly on the hearing, testimony, exhibits, facts, orders and papers before him and improperly included all the filed papers.

VIOLATION OF THE FOURTEENTH AMENDMENT BY THE RESTRAINTS

THE VALIDITY OF THE NEW JERSEY SEPTEMBER 21, 1962 RESTRAINT AND EVERY RESTRAINT OBTAINED THEREAFTER WAS LITIGATED IN NEW YORK BY THE HUSBAND COMPLAINANT WITH BOTH HIS NEW YORK AND NEW JERSEY ATTORNEYS PARTICIPATING THEREIN IN THE NEW YORK FORUM, and said restraints having been litigated cannot be relitigated in the local New Jersey action.

Corpus Juris Secundum Book 27B Section 330-331 Divorce states:

"Submission of issue of pendency of prior action. Where complainant submitted to the foreign court the question of whether the divorce proceeding brought therein should be stayed or dismissed because of the pendency of the local proceeding, the determination of that issue against complainant by the foreign court binding and complainant cannot relitigate that question in the local courts."

and the footnote thereto #58 cites Harrison v. Harrison, 133 A 2d 870, 183 Penna. Super 562.

It further goes on to say, at page 792:

> "and the fact that the foreign divorce court failed to give appropriate recognition to the local restraint does not relieve the local courts from the requirement of according full faith and credit to the foreign divorce decree and everything set forth therein."

THE COMPLAINANT HAVING APPEARED GENERALLY IN NEW YORK AND HAVING SUBMITTED TO THE NEW YORK COURT THROUGH BOTH HIS NEW YORK AND NEW JERSEY ATTORNEYS THE QUESTION OF WHETHER THE SEPARATION ACTION BROUGHT THEREIN SHOULD BE STAYED OR DISMISSED BECAUSE OF THE PENDENCY OF THE LOCAL NEW JERSEY CUSTODY PROCEEDING, the determination of that issue against complainant by the foreign New York Court is binding, and complainant cannot relitigate that question in the local New Jersey Courts two years later as Judge Concilio attempted to do; AND THE FACT THAT THE FOREIGN NEW YORK SEPARATION COURT FAILED TO GIVE APPROPRIATE RECOGNITION TO THE LOCAL RESTRAINT DOES NOT RELIEVE THE LOCAL NEW JERSEY COURTS FROM THE REQUIREMENT OF ACCORDING FULL FAITH AND CREDIT TO THE FOREIGN NEW YORK DECREE OF SEPARATION AND EVERYTHING SET FORTH THEREIN. (Corpus Juris Secundum).

In Harrison v. Harrison, 133 Atl. 2nd 870; 183 Pa. Super, 562, where the Court held once a restraint is litigated in the foreign court first it cannot be relitigated, at page 875, the Court said:

> "The Appellee having submitted to the *

Florida Court, the question of whether or not that proceeding should be stayed or dismissed because of appellant's pending Penna. divorce suit and that issue having been finally determined against her, Appellee cannot relitigate that question in the Pennsylvania Courts."

On the question of other things litigated in said action, i.e., general appearance, the same Court said, at page 814:

"The Appellee's contention that she did not enter a general appearance in the Florida divorce is not borne out by the record before us. She first filed a motion to stay and dismiss the Florida divorce action against her on the ground that there was a divorce action pending against her in Pennsylvania. This point she pursued through the Supreme Court of Florida.

"The Florida record which was annexed to the record by the Court below on the matter now before us proves she was in court...

"Unless a party strictly limits himself to the issue of the jurisdiction of the Court, which the appellee did not do, the decree of the Court is binding upon him in all respects. In Aquelina v. Doan, 1953, 374 Pa. 403; 409; 97 A.D. 2d 520, 522, Justice Chidsey said:

'Defendants chose not to confine themselves strictly to the issue of the jurisdiction of the court and in addition set up a defense on the merits. Under such circumstances the defendants

must be deemed to have by its determination of the legal questions involved: (citing)

"The facts in the present case are similar to those in Commonwealth ex rel Parker v. Parker, 1915, 59 Pa. Super 74. There the wife obtained a support order in Pennsylvania where both were domiciled; the husband went to Nevada where he filed for divorce. Though no personally served, the wife filed an answer asserting that herhusband was not a bona fide resident of Nevada and denying the charge in the bill; the Nevada Court granted the divorce. The husband then filed a petition in Penna. to set aside the support order because of the Nevada decree. The wife answered that Nevada never had jurisdiction over her and her court held that because the wife personally appeared in Nevada, the divorce decree was binding and entitled to full faith and credit quoting inter alia from Swecker v. Reynolds 1914, 246 Pa. 197; 92 A. 76, 77 as follows:

It is a result which obtains in most jurisdictions that any action on the part of the defendant except to object to the jurisdiction, recognizes the case as in Court, and amounts to a general appearance... It is obviously just and fair that if a party wishes to insist on the objection that he is not in Court, he must keep out for all purposes except to make that objection."

"The Supreme Court of Florida said, 71 So. 2d 731, with respect to its approving of the denial of the appellee's motion to stay;"

"So the petitioner found herself a liti-

gant in the Chancery Court in Florida over her protest."

"It thus held that by making the motion Appellee had submitted herself to Florida jurisdiction. This is in accord with the court's holding that a special appearance together with a motion to quash amounted to a general appearance. Gilhart v. Gilhart 1945, 155 Fla. 562."

The defendant thus argued not just a jurisdiction motion, but every motion then before the Court. (See Backer order "argued on the merits several motions"

When the defendant moved to vacate the order of sequestration he made a further general appearance.

The New York case of Ratkowsky v. Ratkowsky, (App. Div. 2nd Dept.) 272 App. Div. 775; 69 NYS 2d 573; decided on April 22, 1947 is exactly in point. The Appellate Division said:

"the acts of the defendant upon his motion to vacate the order of sequestration and to reargue that motion... in presenting affidavits ... were inconsistent with his claim, that his appearance was specialy only to question the jurisdiction of the Court.:

"Farmer v. National Life Ins. Assoc., 138 NY 265, 269, and 33 NE 10757; Henderson v. Henderson, 247 NY 428, 432, 160 NE 775, 777; Legler v. Legler, 224 App. Div. 55, 278 NYS 804; matter of Macauley, 27 Hun. 577, 578; Citizens Trust Co. of Utica v. R. Prescott and Son, Inc., 221 App. Div. 426, 431, 223 NYS 191, 196, 197."

The case at bar is even stronger. The holding of the Ratkowsky case is that a husband who moved in wife's separation action to vacate order of sequestration and to reargue that motion, and who presented affidavits and argued that the parties were living together, made a "general appearance" that gave the Court jurisdiction over him without personal service".

By participating in the merits and defending a motion for alimony and counsel fees and custody and by stating in his motion for reargument that the defendant refused to permit plaintiff to see the child, defendant argued the merits of the alimony, temporary custody and support motion and appeared generally.

The alimony, custody, support and counsel fees motion was submitted August 27, 1962 along with defendant's motion to dismiss for lack of jurisdiction. Submitted also the same day and hour and moment was the third motion by the Receiver to withdraw monies from sequestered funds. The decision on the said three motions.

In Teel v. Yost, 128 N.Y. 387, 28 N.E. 353, the Court held it established that where the defeated party deliberately tenders the jurisdictional fact controversy as a separate issue and loses thereon, he is not free to use the same assertion again as a defense to a suit on the judgment he had so contested (O'Donogue v. Boies, 159 NY 87, 53 NE 537).

There is no question left to be settled in New Jersey. In submitting to the jurisdiction of New York, defendant foreclosed himself from reopening the question of jurisdiction in New Jersey. The New York judgment is entitled to full faith and credit as a

matter of law.

In Sherrer v. Sherrer, 334 U.S. 343, 355, 92 L.ED. 1429 (1948), the Court stated, 334 U.S. at Page 351-352:*

> "We believe that the decision of this Court in the Davis case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a ... decree on jurisdictional grounds in courts of a sister state where there has been participation by the defendant in the divorce proceedings" (separation proceedings in the case at bar) "where the defendant has been accorded full opportunity to contest the jurisdictional issues and where the decree is not susceptible to such collateral attack in the Courts of the State which rendered the decree." *Also see Peff v. Peff, 2 N.J. 250.

Thus, New Jersey must give the same full faith and credit to the New York decree that would be extended to it in New York. Twice in New York in the separation action, the defendant husband litigated and relitigated the question of jurisdiction. The first time was before New York Supreme Court Judge Klein and the second before New York Supreme Court

Judge Chimera. (.. ~ .). The decision in New York of Judge Chimera on the motion wherein the defendant asked for relitigation of the question of jurisdiction was:

> "... the issues are res adjudicata (order of Klein, J., September 12, 1962)."

It is clear that the marital res of the parties hereto cannot be located both in New York and in New Jersey. If it is in New York the New Jersey State Court cannot relitigate jurisdiction. R. S. 2A:34-10. It is not intended on this motion to submit the question of jurisdiction or domicile to a revealing examination because it is unnecessary. The issue is disposed of by the final judgment of the New York Court set forth above.

Assuming for the sake of argument that the child was removed from New Jersey as Judge Concilio preferred to believe. The misapplicatioa of law by Judge Concilio represents a failure on the part of the Judge of the New Jersey Superior Court to subordinate the State's

legislative local policy and domestic law requirement of the United States Constitution. U.S. Const. Art. IV S c. 1. The highest Court of the land has enjoined such subordination and our courts have obeyed as has New Jersey. William v. North Carolina (first case), 317 U.S. 287, 63 S. Ct. 207, 87, L.Ed. 279 (1942); Peff v. Peff, supra, 2 N.J. at page 250; Brown v. Brown, supra 28 N.J. Super at pp. 170, 171. No less was required of the New Jersey Superior Court below.

Also as to the action for the replevin of the furniture, same was physically located in New York and had already been attached by the New York Receiver in sequestration. When the husband there moved to vacate the writ of sequestration he litigated jurisdiction of the res (furniture). The ownership of the furniture was disposed of in the final New York judgment. That is res adjudicata.

The New Jersey Superior Court decided the case at bar contrary to its own law.

The New Jersey Statutes further provide, N.J.S. A. 9:2-4:

> "..in no case shall the court having jurisdiction in this state over the person and custody of any minor permit.."

Edwards v. Edwards, 8 N.J. Super. at Page 550 said however that the power could not be exercised unless the court "has jurisdiction". And that court said that domicile of the child as opposed to his actual residence was at least an alternate ground for the court's decision in Pieretti v. Pieretti, 13 N.J. Misc. 98, 176 A 589 (1953) to determine the question of custody,

In the Joffe case, the New Jersey Custody Court had neither "actual residence" of the Joffe child who was living in New York nor

"domicile" which had already been litigated in New York. In Joffe, New York on the husband's challenge found the child domiciled in New York. New Jersey by finding a special appearance in New York (which precludes a further relitigation of jurisdiction) tacitly thus admitted the New York domicile. All parties admit the child was then resident in New York at the time of commencement of all actions. Thus, there is no basis upon which New Jersey may exercise the rights given to its citizens under NJSA 9:2-2 or 9;2-4.

Neither the Edwards or the Casteel cases are applicable to the case at bar. The New Jersey statute applied to the Casteel children because the wife had, prior to any litigation, by agreement given the custody of them to their father who resided with them in New Jersey. The formal separation agreement vested "sole custody and control" to the husband. The agreement was to be

incorporated in any divorce decree and it was, prior to the New Jersey custody fight. Not so in Joffe, where the child had been found to be a domiciliary (on challenge of the husband) and interim custody had already been given to the wife under Judge Flynn's order , prior to commencement of the New Jersey action based on the statute which qualifies the right to sue under the statute to "when the Superior Court has jurisdiction".

The Casteel case agrees with this brief. It quoted the May case saying:

> "The jurisdictional determination in the May case is not important in the case at hand since the present defendant had submitted to the jurisdiction of the Nevada court." (As did Joffe in New York).

In Edwards (supra.) the wife left New Jersey (the only residence of the parents during the marriage), took the children West and attempted to establish a "pretended

with the husband's consent lived throughout the marriage in New York and New Jersey and the husband had already litigated domicile of the child and lost. Thus the New Jersey statute voicing local policy limits its own applicability in New Jersey to children over which the State of New Jersey already has jurisdiction. New York already has jurisdiction, of the Joffe child adjudicated on the husband's challenge, in addition to which the child was physically present and resident in New York and an order of custody had already attached it. In the Salmon case 88 N.J. Super 302 the husband was never served in Nevada and took no part in the ex parte proceedings. (Not so, Joffe).

Fantony v. Fantony, 31 N.J. Super. 14 held that mere presence of an infant within the state has been held sufficient to give a Court jurisdiction of its custody, subject to the qualification by Chief Justice Cardozo in Finlay v. Finlay, 24 N.Y. 429, 148 N.E. 624,

ARGUMENT ON FULL FAITH AND CREDIT, RES ADJUDICATA AND LACK OF JURISDICTION OF THE NEW JERSEY COURT.

You thus have two conflicting orders to two States under the Federal Constitution.

THE NEW JERSEY RESTRAINT WAS ILLEGAL FROM ITS INCEPTION AND IT WAS LITIGATED IN THE NEW YORK COURTS WITH ALL PARTIES PARTICIPATING.

The decision of Judge Concilio totally failed to recite the fact that prior to the issuance of the September 21, 1962 restraint against the plaintiff wife (restraining her from proceeding in New York) said Judge had issued a restraint against the husband from proceeding in the State of New Jersey dated September 20, 1962. He failed to state that without knowledge or notice and without a hearing on that restraint it was wiped out in an ex parte proceeding between him and the attorney for the defendant and a new restraint - the illegal restraint of September 21st was issued. The circumstances of this affront to due process was attempted to be explained

in New York by J. Mortimer Rubenstein, Esq., New Jersey counsel for the husband defendant when said counsel interposed an affidavit in New York on the husband's New York motion to stay the wife - a litigated motion which litigated the legality of the September 21st, 1962 restraint, two and a half years prior to its relitigation in New Jersey.

(The requesting in the New York suit of this affirmative relief by the husband incidently constituted a further general appearance in the New York action, giving New York in personam jurisdiction of the husband regardless of the fact that he was a New York domiciliary and Judge Concilio's findings of domicile in New Jersey). Regardless of all else, therefore, Judge Concilio was required to give res adjudicata effect to the New York proceeding.

In opposing the husband's application for restraint against her, the wife duly pointed

out and emphasized the prior existence of the decree of New York Supreme Court adjudicating valid process and jurisdiction and restraining him (the husband) from proceeding. That because the wife was in dire need of money for her sick and handicapped child and to prevent foreclosure of valuable real estate owned by the entirety by her husband and herself on which he refused to pay mortgage and taxes, the receiverso ordered by the court proceeded in New York besause New York in a contested proceeding had already adjudicated her a New York domiciliary on her husband's jurisdiction challenge decided September 12, 1962 long prior to issuance of any New Jersey restraint. It was appellant's firm conviction as a New York attorney, which is her profession, that New Jersey would never find her in contempt for proceeding (in a State of which she was adjudicated a domiciliary) to seek relief under the law of the said State. This she based upon the New Jersey case of

Lawrence v. Lawrence and Brown v. Brown cited hereinabove, and depended on the United States Constitution.

THE RE-LITIGATION

The original writ has Chronology of the double litigation as it proceeded in two States with New Jersey relitigating each and every issue between the same parties 2½ years later.

A review of the various litigated New York motions, the orders of the various judges will show that not only did New York Supreme Court Judge Aurelio find that the husband had submitted to the jurisdiction and contested the action in New York, but he also at final hearing went on further and found that not only was the husband a domiciliary at the time of filing suit, but continued to be a domiciliary down to the entry of Judgement, (December 3, 1963).

It is to be noted appellant's contention is that the New York judgment is res adjudicata entitled to full faith and credit, and the

husband's only remedy was by way of appeal in the New York Appellate Division from the New York Supreme Couirt Judgment. This he stated to do, but then he withdrew. The Court of New Jersey cannot substitute its judgments of findings of fact as against the findings of fact of the New York Court where he appeared generally, contested the merits of jurisdiction, and the Court found it to be a fact; The duty of the plaintiff husband was to appeal to the Appellate Division of New York and the husband may not run to New Jersey and have the New Jersey Superior Court review the final judgment and all the interim orders of the New York Court.

As hereinafter noted the appellant at every turn moved to dismiss on the ground:

The New Jersey Court had no jurisdiction to entertain the New Jersey suits because:

1) That Court was obliged to give full faith and credit to the final judgment of New York Supreme Court Judge Thomas

A. Aurelio entered in the case of Gussie Joffe, Defendant v. Sidney Joffe, Plaintiff, which suit was filed in the Supreme Court of the State of New York, County of New York, June 23, 1962.

2) The final judgment of separation entered in the New York action betwen the parties in a contested proceeding with all parties before the Court was res adjudicata.

3) The New Jersey Court was without jurisdiction to try, hear and determine the issue presented to that Court in the suit entitled Joffe v. Joffe, filed August 17, 1962, custody, replevin and injunction action as well as the divorce action.

4) That the rule of comity required that the New York action, having been filed prior to time to the New Jersey action, is entitled to priority of determination, and for the further reason that the issue and parties in both Courts are the same, and the New York judgment having been

rendered by a Court of competent jurisdiction in an action in which both defendant and plaintiff participated and submitted to the jurisdiction of the New York Court, the New Jersey Court should not have intervened and the New Jersey action should have been dismissed.

5) The child and furniture were at all times physically present in New York, and New Jersey had no jurisdiction of the subject matter.

On the question of full faith and credit under the United States Constitution, Article IV, the law is clear that New Jersey will extend the same full faith and credit to the decree of a sister state, that that state will extend to decrees of other states. However, in the case at bar in New Jersey, we have not only an appearance and contest on the issue of jurisdiction, but a finding of general appearance. The case in point in New York are exactly on all fours is Matthews v. Matthews, supra. Added to this is the finding in the

final New York decree of domicile from the inception. Any one of these three points is sufficient to require full faith and credit and sufficient to support an impersonam decree under the facts herein. In the case at bar you have all three points.

RAISING THE FEDERAL QUESTION

The New Jersey complaint alleged the Statute as the basis of jurisdiction and the statute pursuant to which the action was brought.

The Federal question was rasied some 20 days after service of summons and complaint by motion to dismiss on constitutional and jurisdictional grounds.

The Court carried the motion 2½ years during which the Petitioner moved to vacate restraints imposed on the same Constitutional grounds. At the hearing on jurisdiction held by the Court, as it stated, pursuant to the illegal statute the appellant again moved to dismiss on constitutional grounds that the statute being illegal drew in issue and violated the full faith and credit and due process clause of the constitution. The Court denied the motion and precisely quoting the illegal statute determined that said statute gave it jurisdiction to entertain the custody suit,

entertain the restraints, enforce the restraints and enter the contempt judgments for failure to abide by said restraints and deny full faith and credit, equal rights and privileges to petitioner and infant.

During the custody trial at the end of the plaintiff's case appellant moved to dismiss on Constitutional grounds, and that being denied, at the end of the defendant's case appellant moved to dismiss on constitutional grounds specifically stating that the Statute violated the Article 4 and the 8th and 14th amendments.

Thus, the federal question was raised and petitioner claimed the statute deprived her of Constitutional rights on reargument in the Supreme Court of New Jersey, in the Appellate Division brief and in the Superior Court on the motion to dismiss the complaint and the motion to vacate the restraints and the motion to stay the contempt hearings. In the Appellate Division it was first raised on the

Appellant's motion to stay the trial of the custody action until the contempt orders were completed through appellate process. It was further raised in the Superior Court when appellant moved for immunity from the contempt arrests for the purpose of entering the State of New Jersey to testify in the custody action, in which the contempts had been entered before trial. It was refused there and in the Appellate Division and immunity was finally granted in the Supreme Court of New Jersey, only after certiorari was granted on the appeal from the contempt judgments, the fourth year of the custody trial (said case has been on trial six years with all stays in effect, all restraints in effect and without adequate support to the child).

In the Appellate Courts the Constitutionality question was repeatedly raised and in motions to stay execution of the contempts in every appellate court and in motions to stay the custody trial until the constitutionality

question should be decided.

In the Supreme Court of New Jersey the briefs cited the Constitutional question and on reargument in the Supreme Court amplified full faith and credit and deprivation of civil rights, due process and equal rights and immunities, deprivation of liberty and property without due process. The notice of appeal from the Supreme Court of New Jersey specifically quoted the statute and alleged the unconstitutionality. It is requested that the petition for writ of certiorari be treated as a jurisdictional statement and this petition a request for reargument thereof.

PRESENTATION OF GROUNDS ON WHICH IT IS CONTENDED THE APPEAL IS OF A SUBSTANTIAL NATURE, OR FOR ALLOWANCE OF THE WRIT.

The questions involved herein are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." Hamilton v. Regents of University of California, 293 U.S. 245, 258.

The issue raised by the appellant's contention that the New Jersey Statute here in question violates the "equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution involes the problem of discrimination. Children born in New Jersey or residing there 5 years cannot be afforded parens patriae protection by other states in which they may be found or residing as can the children, citizens of other states. Their judgments may not be given full faith and credit as was not the Joffe

child's. They can have no other domicile then that of New Jersey and New Jersey is their only appellate court in the United States where their judgments may be reviewed. This is discriminatory against any child unfortunate enough to be born or reside in New Jersey 5 years. They are deprived of full faith and credit given other children under Article IV - as was the Joffe child. They are deprived of finality of litigation (Durfee v. Duke) as applies to questions of jurisdiction (per Durfee). They can never be domiciled in any other State as could not the Joffe Child. Although New York Law states that an abandoned wife may establish a domicile in New York with her children, New Jersey refuses to recognize this.

The purpose of the New Jersey Statute is to protect children. The clause forbidding removal of the child from the state has

nothing to do with the purpose of the statute as used in Joffe. It is arbitrary and unreasonable in that it does not protect the child and has nothing to do with the promulgated purpose of the statute.

The question thus raised by this statute has never been expressly or impliedly reviewed by the Supreme Court of the United States. For the person involved - any child born in New Jersey whose parents must leave the State to work in another State where they are licensed in order to support the child abandoned by the father - the appeal presents a substantial Federal question open to any parent leaving the state to go with children where children can be supported either by grandparents or jobs in other States. Must they first go to court?

The issues raised by appellant that the New Jersey statute is repugnant to Article Iv and the Fourth and Fourteenth Amendments of the Constitution have also

never been reviewed by the Supreme Court. The New Jersey Statute limits the ability of citizens to travel freely from one State to another. They are deprived of liberty without due process in that the child cannot remain in New York where he was adjudicated a domiciliary and being nurtured or live therein, but must be returned to New Jersey. This is without any court adjudication, but by statute, whereas the infant had a Court adjudication in New York giving it the right to live where it is being supported - by its mother licensed and working in New York. It is deprived of her support plus the adjudicated father support in New York and must take $35 weekly support only, given by New Jersey's Court without taking testimony or due process of any kind for six years. It is deprived of liberty and property without due process because New Jersey under the above statute refuses recognition to the New York order giving the child

use of a home, the weekly support from its father to be taken from sequestration funds. Likewise the mother is deprived of her rights under the New York judgment and told to vacate the same or go to jail - which is deprivation of property and liberty without due process of law - to say nothing of deprivation of custody of her infant child without due process or the advantage of the appellate process of the State of New York. A case on trial six years without a properly adjudicated court award is lack of due process.

Furthermore the appeal upon the grounds presented in the writ - full faith and credit the determination of which is important to any mother or child unfortunate enough to be born in New Jersey or reside there five years and the deprivation of full faith and credit such as had been practiced in the case at bar is important to any child whose mother is separated and residing in another state with the child where her husband had abandoned them and returned to New Jersey. Such mother and

child can never to domiciled elsewhere or have their marital and property rights adjudicated under the law of the State in which they may be found or may be living. The statute affects to transfer jurisdiction of any law suit pending in any state of the union to the State of New Jersey for original jurisdiction or appellate jurisdiction. It frees the state of New Jersey from any fedders of the United States Constitution.

Any adjudication of any other state pertinent to a wife and child will be in doubt whether or not a husband appears in that other state, in accordance with the laws of the state, submits to its jurisdiction and no adjudication of that other state can ever be effective in the State of New Jersey. Any adjudication of divorce, separation or marital status of husband and wife unfortunate enough to have a child born in New Jersey will be in doubt as will the status of their marriage and their property rights adjudicated in that other state. Only a decision by the Supreme

Court of the United States in this cause will remove this grave uncertainty by deciding to what extent the enactment of the here relevant section has rendered inoperative judgments of other states on the same subject matter or marriage.

Petitioner respectfully shows to the Court that this is a case of great importance to petitioner and any wife, member of the general public who should happen to have a child born in a New Jersey hospital or an auxiliary home either at a vacation point in the lakes along the Atlantic Ocean, the South Jersey Shore, Points of Atlantic City, Drehl Asbury Park or at any point where any child resided for a period of five years in the State of New Jersey, though it be physically present in another State of the Union or have its permanent home and/or domicile in any other State, or theyumove outside of the State.

If the statute is allowed to stand or the decision as the statute has been interperted

and implemented by this case, New Jersey need never give full faith and credit to any judgment of divorce or separation from any other state if the parties thereto have or ever had a child born in New Jersey or residing in New Jersey for a period of five years. In addition, it will permit an entire relitigation of all of the matrimonial and jurisdictional issues decided by the parties in a contested action in any other state of theunion and completely deprives the litigants of any finality of litigation or full faith and credit under the United States Constitution, will lead to a multitudinous multiplicity of matrimonial suits and result in further constitutionality deprivations to wives and children in other states completely depriving them of any support of permanent residence during minority.

The exact questions at bar in the matter of full faith and credit and the right of finality of litigation has been definitely settled and passed upon by this Honorable

Court and the identical questions now submitted to the court have been passed upon by the courts of last resort of various states even New Jersey and the United States Supreme Court and in every instance the opinion of these courts have upheld the contention now made by your petitioner. A few of the cases are:

Durfee v. Duke, 375 U.S. 106

Davis v. Davis, 305 US 32, 83 L.Ed. 26 (1938)

Baldwin v. Ohio Travelling Men's Assoc. 283 U.S. 522,

Halvey v. Halvey 330 U.S. 610
Estin v. Estin, 334 U.S. 541

Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360

Finlay v. Finlay, 240 NY 429, 148 N.E. 624, 40 A.L.R. 937 (1925)

It is respectfully submitted by petitioner that it is necessary that this honorable court settle the question, not only on account of its importance, but also on account of the fact that the decision of the Supreme Court ofNew Jersey conflicts with the decisions of so many other Courts of last resort and most particularly numerous decisions of this Supreme Court of the United States, repeatedly recited.

THERE HAS BEEN A SUPERVENING SUPREME COURT OF THE UNITED STATES DECISION WHICH REQUIRES THAT THIS COURT TAKE JURISDICTION.

Judge Concilio relitigated jurisdiction and entered his opinion August 24, 1964. On December 23, 1964 the Supreme Court of the United States in Durfee v. Duke, 375 U.S 106 definitely settled the question and held that once the parties have had their day in court, and litigated the question of jurisdiction, they are bound thereby, that one litigation of an issue is enough.

Further, although the case of Townsend v. Sain 372 U.S. 293 holds that the appellant is entitled to a full hearing on the question of contempts and the court must remand same for full hearing, this the Supreme Court of the State of New Jersey refused to do. Although the Appellant rested on the Federal and jurisdic-

tional question throughout and never had full hearing on the question of wilfullness etc.; the Supreme Court on reargument refused to consider the issue, did exactly what Durfee v. Duke forbids. New Jersey Judge Concilio after investigating jurisdiction on the appellant's motion to dismiss the custody complaint found that appellee husband had entered a special appearance in the New York separation action. Judge Concilio specifically found that the appearance was entered for the purpose of litigating jurisdiction of the subject matter and his person pursuant to New York Statute (237a) designed for that purpose. Judge Concilio agreed that New York had issued an order after litigation of that issue finding jurisdiction and domicil in New York. However Judge Concilio then went beyond the permissible scope of inquiry as permitted by Durfee. After finding juris-

diction had been litigated in New York he relitigated that question in New Jersey, took testimony of respondent while appellant rested on the New York decree. Judge Concilio sat as an appellate court to Judges Klein,Backer and Aurelio of the New York Supreme Court and disagreed with New York's finding that respondent had entered a general appearance and that New York had jurisdiction of the subject matter, marital res and child and person of respondent. Finding jurisdiction in New Jersey to entertain the custody case, Judge Concilio then found jurisdiction to enter restraints and punish for violation thereof. Further, although the restraints and their legality and validity and efficacy were previously litigated in New York by respondent (after losing his jurisdiction motion) the Judge proceeded to relitigate the validity and efficacy thereof and

gave them efficacy where New York 2½ years prior had denied it.

The New Jersey Superior Court proceeded to do just what the Supreme Court of the United States forbids in Durfee. It decided the Appellate question exactly opposity to the Supreme Court of the United States and held that Judge Concilio properly relitigated jurisdiction to arrive at a finding of domicile of an absent child which domicile conferred jurisdiction on the court to issue restraints. It sustained Judge JConcilio's finding that NJSA 9:2-2 applying to "native" children gave him authority to determine the Nativity or domicile of the parents and thus the absent child-ignoring the New York final judgment that the child "since birth" was domiciled in the State of New York.

The New Jersey Supreme Court violated Durfee in sustaining the appellate

division finding that there was nothing in the record to show that New York had jurisdiction prior to the appellant being served in New Jersey. It held that the contempt orders entered for violation of restraints imposed in a custody action of an absent child were properly entered in the custody action wherein jurisdiction was heard and determined the issue of custody, was conferred on the court by a statute which was used to illegally relitigate jurisdiction - all contrary to the Fourth Amendment requiring New Jersey to give full faith and credit to the New York judgments and decrees.

The Supreme Court of New Jersey decided the case not in accord with its own decisions. It also had decided the question not in accord with the applicable decisions of its own courts in Gerard v. Distefano, 84 NJ Super 396 (1964); Hudson v. Hudson, 36 N.J. 549 (1961).

THE SUPREME COURT OF NEW JERSEY HAS DECIDED THE CASE NOT IN ACCORD WITH THE APPLICABLE DECISIONS.

The attention of this Court is respectfully directed to the landmark case of Durfee v. Duke (375 U.S. 106, 11 L . Ed. 2d 186, 84 S. Ct. 242, December 23, 1963) which constitutes the latest decision of the United States Supreme Court reviewing the e tire history of matrimonial decision, finally settling once and for all the facts that jurisdiction once litigated between the parties, can never be relitigated.

On page 192 thereof the Court said:

> "The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... from which they are taken". Full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it. "By the Constitutional provision for full faith and credit, the local doctrines of res adjudicata, speaking generally become a part of national jurisprudence, and there-

fore federal questions cognizable here." Riley v. New York Trust Co. 315 U.S. 343, 349, 86 L. Ed. 885, 891, 62 S Ct. 608."

"However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully declined the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully andfairly litigated and finally decided in the court which rendered the original judgment.

With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn., 283 US 522, 75 L ed 1244, 51 S Ct 517. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the Court in Iowa that that question had been fully litigated in the Missouri forum. "Public policy", said the Court, "dictates that there be an ed of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as betwen the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded

by the judgment of the tribunal to which he has submitted his cause." 283 US, at 525-526, 75 L ed at 1247.

Following the Baldwin case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. Davis v. Davis, 305 US 32, 83 L ed 26, 59 S Ct 3, 118 ALR 1518; Stoll v. Gottlieb, 305 US 165, 83 L ed 194 59 S Ct 134; Treinies v. Sunshine Mining Co. 308 US 66 84 L ed 85 60 S Ct 44; Sherrer v. Sherrer, 334 US 343 92 L ed 1429, 68 S Ct 1087, 1 LAR 2d 1355. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.

In the Davis case it was held that the courts of the District of Columbia were required to give full faith and credit to a decree of absolute divorce rendered in Virginia, despite the claim that the Virginia court had lacked jurisdiction because the plaintiff in the Virginia proceedings had not been domiciled in that State. In the course of the opinion the Court stated:

> 'As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respon-

> dent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation.' 305 US, at 40, 83 L ed at 29, 118 ALR at 1521.

This doctrine of jurisdictional finality was applied even more unequivocally in Treinies, supra. In Treinies, the rule was succinctly stated: "One trial of an issue is enought. "The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well as to jurisdiction of the subject matter as of the parties." 308 US, at 78, 84 L ed at 93.

The reasons for such a rule are apparent. In the words of the Court's opinion in Stoll v. Gottlieb, supra, "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.. Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to

present his evidence..a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue . There is no reason to expect that the second decision will be more satisfactory than the first." 305 US at 1721,83 L ed at 109.

It is submitted the New Jersey Joffe decision is diametrically the opposite of the holding of the Durfee case.

3. THE COURTS OF NE# JERSEY HAVE DECIDED THE CASE NOT IN ACCORD WITH ITS OWN APPLICABLE DECISIONS, of Gerard v. De Stefano, 84 N.J.Super 396 (1964) and Hudson v. Hudson 35 NJ 549 ((1961)

In Gerard v. Distefano, supra the Supreme Court of New Jersey held that Under the Article Iv of the United States constitution due process means that:

"Under the full faith and credit clause the attack cannot be made..in a sister state by one of the parties to the decree in the granting State where both parties have appeared."

In quoting the Williams v. North Carolina case supra..the court said:

> "'When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court..in the rendering state, it cannot be attacked by them anywhere.'"

4. THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY HAS DECIDED THE CASE NOT IN ACCORD WITH ITS OWN PREVIOUS DECISIONS.

The leading case in New Jersey on whether or not a non-domiciliary may be held in contempt for proceeding in the face of a restraint in a matrimonial action is Lawrence v. Lawrence, supra. While Brown v. Brown, supra in the Appellate Division of Superior Court, New Jersey, held that one must go to the appellate division prior to proceeding in the face of a restraint to ascertain whether the order was legal - Lawrence case held that the one exception to the general rule of Brown v. Brown was where the court issuing the order had no jurisdiction.

The decision of the Appellate Division which the New Jersey Supreme Court affirmed said:

> "There is nothing in the record to establish that at the time the Chancery Division action was commenced, the New York Court had personal jurisdiction over the plaintiff or the marital res."

In the record before this Court and before the Appellate Division and Judge Concilio is the decision of New York Supreme Court Judge Backer wherein he lists all of the things defendant did in New York to effect a general appearance, which says in the dispositive section (

Defendants' Notice of Motion to vacate service of process dated August 15, 1962 together with affidavits of Sidney H.

> Joffe sworn to August 14, 1962 with exhibits questioning jurisdiction of the person and subject matter."

> "All of the appearances of defendant's counsel labelled "special" or otherwise and all of the extensions of time, arguments and reargruments of motions heretofore had herein, and all other papers, exhibits, supporting papers and the following..."

Judge Backer thus said that defendant from the first motion (August 14, 1967) to vacate and adjournment prior thereto July 22 defendant appeared generally. The August 22nd affidavit referred to by Judge Backer and which was before Judge Concilio (see page 239 of Judge Concilio's opinion) said: of that affidavit where in the New York defendant doctor said:

> "I cannot, however, permit to go unchallenged plaintiff's statements concer ing my alleged difficulties with Internal Revenue.. It had no connection with the merits of the jurisdiction. Plaintiff's statements concerning this aspect is a deliberate falsification of fact."

In speaking of an affidavit he signed in

1959 wherein he claimed to be a resident of New York he said:

> "I assumed my signature.. necessary in order to start the action. This is the nature of my sworn testimony that I was a New York resident in 1959".

Also on August 22nd he said: (in an affidavit) which was addressed to a motion not of jurisdiction but to withdraw monies from sequestered funds:

> "I cannot at this time meet some of the issues created by the plaintiff without avoiding a general appearance and I ask the Court to take this factor into consideration.. However I am advised the plaintiff has made the necessary payments to the bank so that there is no danger of foreclosure."

Although he stated he did not want to argue the merits that is just what he did, and Judge Backer so found. Judge Backer's order is part of the record and refer to the affidavits of August 14 and 22nd that constituted general appearance.

THE NEW JERSEY COURT COULD NOT GO BEHIND JUDGE BACKER'S ORDER OR JUDGE AURELIO'S judgment. All it may do is see if there was a

special appearance to argue jurisdiction. Judge Klein's order, Appendix proves this. Once it has ascertained that it must accept the decision of the court in which the challenger asked the decision. The landmark decision of Durfee v. Duke says that once a court has ascertained a person made a special appearance to contest jurisdiction and it was decided against him, he is bound by that decision and is precluded from ever going to any other state of the United States to relitigate it right or wrong. His only appeal lies to the Appellate Division of the state which rendered it. The Supreme Court in the Durfee case cited as its authority a New York case and the New Jersey Case of Davis V. Davis which went all the way up to the Supreme Court of the United States.

Thus, appellee having asked New York to determine jurisdiction by his motion August 14, he is bound by that determination for

which he asked because in asking he submitted himself to the New York decision. The date of asking was August 14 (to say nothing of his general appearance July 22, 1962 as Judge Backer says). The appellant was not served until August 23, 1962 when she entered New Jersey.

Further Judge Flynn's order attached the child in New York and gave the mother interim custody. The father had appeared and submitted to a jurisdictional decision August 14 and 15th. There was nothing left for New Jersey when the wife was served there because New York had full jurisdiction to decide all of the issues, and had been asked by the husband to decide jurisdiction.

The case in New York which clearly spells out when a special appearance becomes a "general appearance" is Matthews v. Matthews, supra.

THE SUPREME COURT OF NEW JERSEY PERMITTED RELITIGATION OF THE QUESTION OF DOMICILE IN A CASE FOR CUSTODY OF A CHILD CONTRARY TO THE COURT OF APPEALS OF NEW YORK HOLDING IN FINLAY v. FINLAY

The Supreme Court has held that parents cannot adjuciate their rights in a custody proceeding. In Finlay v. Finlay 240 NY 429 148 N.E. 624, 40 ALR 937 (1925) Judge Cardozo in a majority opinion for the Court held that a custody action:

> "may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere nor for the definition of parental rights dependent on status.. parents so situated must settle their controversies at home.."

Since New York had already adjudicated the domicile and since custody had been decided in New York, the relitigation of domicile of the parents in the custody action, could not be done in the face of the Supreme Court holding thereon.

THE ACTION HEREIN SHOULD HAVE BEEN DISMISSED BECAUSE THE SUPREME COURT OF NEW YORK HAS HELD THAT CUSTODY OF A CHILD IN THE ABSENCE OF A PENDING MATRIMONIAL ACTION,

> such as divorce or separation action or action for maintenance of separate maintenance must be adjudicated, only by way of writ of habeas corpus or petition to the chancellor or whatever court has taken place of the chancery.

In Halvey v. Halvey quoting Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 625, 40 ALR 977, the Supreme Court of the United States sustained a decision wherein the Court dismissed a father's "action for custody" brought by way of complaint for custody on the ground that it was the wrong remedy, and that the presence of the child or residence of the child in the state could not be used to adjudicate parental rights. The lower Court held that custody could only be adjudicated upon a proceeding commenced by writ or petition, and not a Supreme Court action. The New Jersey Superior Court has done exactly what the Supreme Court of the United States has held cannot be done.

A copy of the opinion of Judge Conciliio is appended in the original index to the original writ and the deleted portions printed and appended hereto as Appendix
A copy of the decrees appealed from is appended to the original writ as Appendix

Therefore the appellant Gussie Joffe respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code, or Section 1257 (3).

CONCLUSION

For these various reasons the writ of certiorari should issue or in the alternative the writ should be treated as a jurisdictional statement based upon the motion for rehearing herein, and the Judg-

ments below should be reviewed by this Honorable Court.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that the aforegoing petition is submitted in good faith and not for purpose of delay, and is limited to the reasons set forth in Rule 58:2.

Dated: May 20, 1968.

F. JOSEPH DONAHUE
Attorney for Defendant-Petitioner Gussie Joffe
503 D Street, N.W.
Washington, D.C. 20001.

Portions of September 24, 1962 opinion of New Jersey Superior Court Judge Vito A. Concilio which appear to have been omitted from Appendix B of original petition for writ(heretofore filed) and which goes after B6 and before B-11 thereof. (Designated B 7a to j herein)

"It is inescapable from the evidence presented by the plaintiff that he has sustained the burden of proof cast upon him and that at the time of the commencement of this action he had been and still is a resident and domiciled in the State of New Jersey. The Court further finds that the infant child of the parties was also domiciled in this State until defendant removed him to New York.

II

The next question to determine is whether this Court has jurisdiction to decide the issue of custody.

N.J.S.9:2-3 provides; "When the parents of minor childrenalive separately***, the Superior Court, upon complaint of either parent shall have l power to make judgments or orders concerning their ** custody,**concerning children whose parents who are divorced***.

This power cannot be exercised unless the Court has jurisdiction.

The case of Edwards v. Edwards reported in 8 N.J.Super.page 547 (Super.Ct.1950) appears to be a case in point with the one presently before this court. In that matter the plaintiff husband and defendant wife, a native of California where her family still resides, were married in San Francisco in 1939. In 1942, they established their home in Glen Rock,New Jersey, and are the parents of three children. In November ,

1949, Mrs. Edwards, taking with her the children, left her husband and went to California, and she and the three children reside in the City of Santa Barbara, in that State. Defendant on December 22 1949, commenced in the Superior Court of California, an action for separate maintenance, division of community property, custody and support of the children, against the plaintiff. The papers in this action together with an order to show cause relating to suppprt, maintenance, counsel fees pendente lite, were served upon the plaintiff in New Jersey. Meanwhile the plalntiff had commenced an action in this Court for custody of the children, and for other relief. Plaintiff obtained personal service in California on the wife. She moved for an order dismissing the complaint on the grounds that **the court lacked jurisdiction over the subject matter in that defendant and the children

do not reside in New Jersey***

Judge Hagarty in his decision points out that: "The state of domicile of the child can change the custody of the child from one parent to the other or to or from both." Restatement, Conflict of Laws S145, and see section 117. Domicil of the child as opposed to his actual residence is at aleast an alternate ground for the Court's decision in Pieretti v. Pieretti, 13 N.J.Misc.98, 176 A.589 (1935) to determine the question of custody. See In re Williams, 77 N.J. Eq. 478, 482, 77 A. 350, 353 (1910); Heard v. Heard, 323 Mass.357, 82 N.E. 2d 219 (1948). Conley v. Conley, 324 Mass. 530, 87 N.E.2d 153 (1949).

The question thus becomes -- where is the children's domicil? It is stated in the Restatement, Conflict

OF Laws, s30, that: "***a minor child has the same domicil as that of its father." Also, Pieretti v. Pieretti, 13 N.J.Misc.98,102, 176 A.589 (1935); see Rinaldi v. Rinaldi, 94 N.J.Eq.14,118 A.685 (1922). A though it may be admitted that the mother can establish a separate domicil, Shepherd v. Ward, 7 N.J.Super. 130 (1950) and it may be assumed arguendo that she has done so, the fact that the c children live with her cannot be said to change their domicil save where, for example, the parents are divorced or judicially separated. Restatement, Conflict of Laws, S32. Defendant argues further that the child's domicil is that of the mother, if the mother has been justified in leaving the father. Whether or not that is correct, it cannot be determined at this stage when the question of the defendant's cause or reason in leaving

the plaintiff is viogrously contested. Therefore, I conclude that this court has jurisdiction to decide the question of custody.¥"

"See also Fantony v. Fantony, 31 N.J. Super 14, (Super Ct. A.D.1954) Aff'd and modified 21 N.J.525, (Sup.Ct.1956) Judge Freund who wrote the opinion in the Appellate Division concisely stated:

"Vice-Chancellor Howell stated in In re Williams, 77 N.J.Eq.478(Ch.1910);

"' I see no reason in the nature of things why this court, by virtue of its general jurisdiction over infants, does not acquire the same authority and control over the care and custody of infants who are actually resident in this state as it does over infants who are actually domiciled here.¥"

"Under general equity jurisdiction for the protection of the incompetent or helpless

the mere presence of an infant within the State has been held sufficient to give a court jurisdiction of its custody: In re Erving 109 N.J.Eq.294 (Ch.1931); Hachez v. Hachez, supra. In re Olcott,141 N.J.Eq 8(Ch.1947); In re Smith...This rule is subject to the qualification stated by Chief Justice Cardozo in Finlay v. Finlay, 240 N.Y.429, 148 N.E.624,40 A.L.R.937 (Ct.App.1925),quoted many times in this and other jurisdictions: "The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere,nor for the definition of parental rights dependent upon status.***Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child."

"The position of the State of New Jersey

concerning the public policy of the State of New Jersey to determine the custody of minor children native to and resident of as well as domiciled in New Jersey all their lives prior to be ing removed to another State by one of the parents is clearly set forth by Judge Conford, speaking for the Appellate Division in Casteel v. Casteel, 45 N.J.Super 338, on pg.352 (Super A.D.1957), as follows:

> "' The Statutory expression of New Jersey's policy concerning the removal of minor children of divorced parents or separated parents from this State dates from L.1902, c.92 and is now found in the following provisions of the Revised Statutes, as amended:
>
> "NJSA 9:202: "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this state, or have resided five years within its limits, they shall not be removed out of its jurisdiction against

> their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order."
>
> "N.J.S.A.9:2-4: "***in no case shall the Court having jurisdiction in this state over the person and custody of any minor permit such child to be removed from this State where the mother or father resides in this State and is the suitable person who should have custody of such child for its best welfare".

"This legislation supplements the parens patriae jurisdiction of the court, Fantony v. Fantony, supra (21 N.J.,at p.535). Section 9:2-2 evinces a strong policy predilection for keeping minor native residents of this State of tender years, children of divorced parents or separated parents, from being removed from the jurisdiction without the consent of both parents. Grove v. Grove,26 N.J.Super.154,157 (App.Div.1953); Sheehan v. Sheehan, 38 N.J.Super.120,126 (App.Div.1955). Only if the court is satisfied that the best interests of the child

call for it may such removal take place. And the Court before which cause must be shown is the Superior Court of this State not a tribunal of another jurisdiction. Equally integral to our local public policy is the requirement of Section 9:2-4 that no child shall be removed from the State where a New Jersey court determines that a New Jersey resident parent is his suitable custodian. See Matflerd v. Matflerd 10 N.J.Super.132 (App.Div.1950)."

This Court concludes on this issue that from the testimony it has heard that this Court has jurisdiction to hear this matter.